THE CASE OF EDMUND ROLFE, Esq; Appellant, AND JOHN PETERSON and Son, Respondents,

Which was heard at the

BAR of the HOUSE of LORDS,

On MONDAY and TUESDAY,

The 17th and 18th Days of FEBRUARY, 1772.

TOGETHER WITH

The Arguments made use of on both Sides:

AND

The Proceedings and Determinations thereon.

NORWICH:
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Appeal from the Court of Chancery.

EDMUND ROLFE, *Eſquire*, - - Appellant.

JOHN PETERSON, *the Elder*, and JOHN PETERSON, *the Younger*, - - - - - - - } Reſpondents.

The Appellant's CASE.

THE Appellant being ſeized in Fee of a Manſion-Houſe, Farm, and Lands, at *Eaſon*, in the County of *Norfolk*, called *Eaſon-Hall* Farm, by Leaſe dated the 23d of *September*, 1758, demiſed the ſame, by the Deſcription of a Capital Meſſuage, or Manſion-Houſe, Barns, Stables, Dairy, Carthouſe, Outhouſes, Dovehouſe, Yards, Gardens, Orchard, with the Cottages, and 400 Acres of Arable and Paſture Land, to be enjoyed Corn-Tythe free, and the Fold-Courſe or Sheep-Walk for the ſmall Trip of Sheep, then let to *John Rackham*, (except all Manner of Timber and other Trees, Wood and Underwood, with Liberty for the Appellant to cut down and carry away the ſame; And alſo Liberty to ſurvey and view the State and Condition and Uſage of the ſaid Leaſed Premiſes; And alſo to repair, build or rebuild the ſaid Capital Meſſuage or Manſion-Houſe, and the Out-houſes

23d September, 1758. Leaſe.

houſes and other Edifices of the ſame, and to lay the Materials neceſſary for that Purpoſe in convenient Places belonging to the ſaid Premiſes; And alſo full and free Liberty for the Appellant, his Heirs or Aſſigns, his or their Friends, Companions, or Servants, to hunt, courſe, ſet, hawk, fowl, fiſh, game, and ſport, in, over, and upon, the ſaid Leaſed Premiſes, and every Part thereof, at all ſeaſonable Times, at his and their free Wills and Pleaſures; And alſo free Liberty to ſet, plant, and tranſplant Fruit-Trees, and other Trees of all Sorts); To hold to the Reſpondents, their Executors, Adminiſtrators, and Aſſigns, for the Term of Fourteen Years, from the 10th of *October* then next, at the yearly Rent of 200*l.* payable half-yearly; and, (among other Covenants contained in the Leaſe on their Part),

1ſt Covenant broke.

The Reſpondents covenanted with the Appellant, that in Caſe any Part or Parcel of the ancient Meadow, or Paſture Ground, or any other Part of the thereby Leaſed Premiſes, that had not been in Tillage within Twenty Years then laſt paſt, ſhould, during the Continuance of the ſaid Term, be digged up, ploughed, or converted into Tillage; Or, if any Part or Parcel of the Arable Lands thereby leaſed ſhould, in or during the ſaid Term, be ploughed or ſowed out of Courſe, contrary to the true Intent and Meaning of the ſaid Indenture, or the Covenants therein contained, then, and in ſuch Caſe or Caſes, the Reſpondents, or one of them, their Executors, or Adminiſtrators, ſhould and would, during the then Remainder of the ſaid Term, pay unto the Appellant, his Heirs or Aſſigns,

Aſſigns, the further Yearly Rent or Sum of 5*l.* for every Acre ſo to be broke up, or converted into Tillage as aforeſaid, and ſown out of Courſe, and ſo proportionably for every greater or leſſer Quantity than an Acre, or longer or ſhorter Time than a Year, over and above the ſaid Yearly Rent, and upon the Days of Payment thereof, by equal Portions; the firſt Payment to be made on ſuch of the ſaid Feaſt Days as ſhould firſt happen after ſuch Digging, Ploughing up, or Converting into Tillage, or Sowing out of Courſe, as aforeſaid.

And further, that the Reſpondents, their Executors, Adminiſtrators, or Aſſigns, or either of them, ſhould not, nor would, during all or any Part of the ſaid Term of Fourteen Years, hew, fell, cut down, ſtub up, lop, top, take or carry away, or cauſe or procure to be hewed, felled, cut down, ſtubbed up, lopped, topped, and taken or carried away, any of the Timber-Trees, Timber-Stands. Willows, Sallows, Pollards, Hazles, Thorns, Hedgerows, Quickſets, Buſhes, Springs, or Hedges, ſtanding, growing, or being, or which, at any Time or Times during the ſaid Term, ſhould ſtand, grow, or be, in, upon, or abour the ſaid Leaſehold Premiſes (except ſuch Thorns, Buſhes, and Brambles, as ſhould be wanted to repair the Gaps in the Fences, to be cut and taken in ſuch Places on the Premiſes, where the ſame could be beſt ſpared, and where the leaſt Damage ſhould be done to the ſame thereby, and to be uſed for that Purpoſe by the Reſpondents, their Executors, Adminiſtrators, or Aſſigns, in a careful and huſband-like Manner; And alſo

2d Covenant broke.

except ſuch Thorns, Buſhes, Brambles, and Stakes, as ſhould be wanted to repair the Reſt of the Fences, to be ſet out by the Appellant, his Heirs and Aſſigns, as therein after mentioned; And in Default of ſuch Setting-out, then where the ſame could be beſt ſpared, and to be of leaſt Damage to the Premiſes; And alſo except the Top-Wood of Pollards, Underwoods, and Thorns, where the Ditching, Cutting, and Scowering therein after mentioned, ſhould be done; which, after making a good Hedge there, and applying the Overplus Thorns towards repairing the Reſt of the Fences, the Reſpondents, their Executors, Adminiſtrators, and Aſſigns, were to have and take, to their own proper Uſe, as therein after mentioned) under the Penalty of forfeiting and paying unto the ſaid Appellant, his Heirs or Aſſigns, the Sum of *5l.* for every Load that ſhould be ſo hewn, felled, cut down, ſtubbed up, lopped or topped, taken or carried away, as aforeſaid; and ſo proportionably for any greater Quantity than a Load.

3d Covenant broke.

And alſo that the Reſpondents, their Executors, Adminiſtrators, and Aſſigns, ſhould and would, from Time to Time, and at all Times during the ſaid Term, do his and their beſt Endeavours to preſerve all the young Trees, Layers, and Quicks, of all Kinds then ſtanding, growing, or being, or to ſtand, grow, or be, in, upon, or about, the ſaid demiſed Premiſes, or any Part thereof: And in Caſe any Perſon or Perſons ſhould deſtroy, ſpoil, or damage the ſame, at any Time or Times during the ſaid Term, that then the Reſpondents, their Executors,

tors, Adminiſtrators, and Aſſigns, ſhould and would forthwith, from Time to Time, give Notice thereof to the Appellant, his Heirs or Aſſigns, and by whom, to the beſt of their Knowledge, the ſame was done, or how otherwiſe the ſame happened, that ſuch Perſon or Perſons committing the ſame might be proſecuted as the Law directs.

And alſo that the Reſpondents, their Executors, Adminiſtrators, or Aſſigns, at their or one of their proper Coſts and Charges, ſhould and would, from Time to Time, and at all Times during the ſaid Terms of Fourteen Years, keep and maintain, and at the End, or other ſooner Determination thereof, leave and yield up to the Appellant, his Heirs and Aſſigns, the Gardens of or belonging to the Premiſes (except ſuch Part thereof as was thereby agreed to be converted into an Orchard) and alſo the Court-yards, and alſo the Orchard, and the Part of the Garden which was to be converted into an Orchard, in an handſome, good, and proper Manner, as Gardens, Court-yards, and Orchards reſpectively; and alſo keep and preſerve all and every the Fruit-Trees, and other Trees there growing and being, or to grow and be there during the ſaid Term, by pruning and managing the ſame, and the Fences thereof, in a careful and proper Manner; the ſame being to be put into a like State by the Appellant, his Heirs or Aſſigns, at the Commencement of the Term. 4th Covenant broke.

And alſo that the Reſpondents, their Executors and Adminiſtrators, ſhould not, nor would, at any Time or Times during the ſaid 5th Covenant broke.

Term, ſow, or cauſe to be ſown, any Part of the Arable Lands of the thereby leaſed Premiſes with Winter-Corn, without firſt Summer-Tilling, mucking, and tathing the ſame, in an Huſband-like Manner; except in a dry Seaſon, when the Ollands could not be broke up at or about Midſummer Time; in which Caſe the ſame might be ſown with Winter-Corn upon the Flagg.

The Reſpondents, upon or ſoon after the Execution of the Leaſe, entered upon, and occupied, the demiſed Premiſes under the ſaid Leaſe; and there being a Piece of Land, Part of the demiſed Premiſes, containing Ten Acres, and called the *Whinns*, or *Furze-Cover*, which had not been in Tillage within Twenty Years before the Date of the Leaſe (which were not only a Cover for and Preſervation of the Game, but alſo a Cover or Shelter for Sheep in Winter Time, and ſnowy Weather; and being cut at proper Seaſons, produced a conſiderable Profit, (ſuch Furzes or Whinns being uſed in that Country for Firing and Fencing) the Reſpondents, in the Beginning of the Year 1762, ſtubbed up all the Whinns and Furze growing therein, and ſold and diſpoſed of ſuch Whinns and Furze for a conſiderable Sum of Money, and afterwards converted the ſaid Piece of Land into Tillage, contrary to their Covenant, and without the Conſent or Privity of the Appellant.

1765, Award as to other Matters.

The Reſpondents alſo committed Breaches of the other Covenants before mentioned.—But before any of theſe Breaches of Covenant came to the Knowledge of the Appellant, a Queſtion aroſe between the Appellant and the Reſpondents reſpecting

reſpecting an Allowance of Five Guineas a Year to the Reſpondents, which had been formerly paid for the Right of Foldcourſe belonging to the Farm, and alſo with reſpect to other Matters; which Queſtions the Appellant and Reſpondents, on the 22d of *July* 1765, referred to Arbitration, and were decided in Favour of the Appellant by an Award of *Henry Partridge* and *Charles Turner*, Eſqrs. on the 30th of *November* 1765; which Award the Reſpondents have not yet performed.

In the Month of *April* 1766, the Appellant firſt had Notice of the Ploughing up the ſaid Ten Acres, and thereupon inſiſted that the Reſpondents ſhould pay him the ſaid increaſed Rents of 5*l.* a Year for each of the ſaid Ten Acres, ſo ploughed up and converted into Tillage, contrary to their Covenant, and which they had continued in Tillage from the Time the ſame were firſt ploughed up; and the Reſpondents refuſing to pay ſuch increaſed or additional Rent, and having broke the ſeveral other Covenants above ſet forth,

Action for Breach of the above Covenants.

The Appellant, in *Trinity* Term 1766, brought an Action of Covenant in the Court of Common Pleas againſt the Reſpondents, and declared therein, on Five ſeveral Breaches of Covenant: 1ſt, For Non-payment of the Rent of 5*l.* an Acre for ploughing up and converting into Tillage the ſaid Ten Acres, and continuing the ſame in Tillage for Four Years, from the 5th of *April* 1762, to the 5th of *April* 1766: 2d, For ſtubbing up and carrying away Forty Loads of Whinn-Buſhes growing on the ſaid demiſed Premiſes: 3d, For ſuffering great Part

of the young Trees, Layers, and Quicks, to be deſtroyed and damaged: 4th, For not keeping and preſerving the Gardens, Court-yard, Orchard, and Fruit-Trees, in a handſome and proper Manner, purſuant to their Covenant: 5th, For ſowing Ten Acres of Land, Part of the Arable Lands of the ſaid Farm, with Winter Corn, without firſt Summer-Tilling, mucking, and tathing the ſame, in an Huſband-like Manner.

Verdict and Damages 300l.

The Reſpondents did not think fit to plead to the Declaration, but ſuffered Judgment to go againſt them by Default; and the Appellant cauſed a Writ of Inquiry of Damages to be executed on the ſaid Judgment; upon the Execution whereof, the former Tenant of the ſaid Farm, and ſeveral other Perſons, were ſworn and examined on the Part of the Appellant, and proved, that by breach of the ſaid ſeveral Covenants the Appellant's Farm had ſuffered Damage to the Amount of 300*l.* The Jury aſſeſſed the Appellant's Damages at 300*l.*

Two more Actions brought for the Rent.

The Reſpndents continuing to keep the ſaid Ten Acres in Tillage, and refuſing to pay either the increaſed Rent for the ſaid Ten Acres, or the original Rent of the ſaid Farm, which became due at *Michaelmas* 1766, Old Stile, and *Lady-Day* 1767, Old Stile, reſpectively, the Appellant was obliged to bring two Actions againſt them for ſuch reſpective half-yearly Rents, and increaſed Rents, and obtained Judgments thereon againſt the Reſpondents, by Default; and upon the Execution of Writs of Inquiry upon ſuch Judgments the Appellant recovered Verdicts

dicts for the ſaid reſpective half Year's original and increaſed Rents.

The Reſpondents, inſtead of paying the Damages recovered by the Appellant in the ſaid ſeveral Actions, cauſed Writs of Error to be brought on the ſaid Judgments; but ſuch Writs of Error have been ſince non-proſſed, and the Judgments affirmed.

Writs of Error brought by Reſpondents, non-proſſed.

In order to put the Appellant to all the Expence they could, the Reſpondents, in *Trinity* Term 1766, brought an Action at Law againſt the Appellant, and declared thereon againſt him, for having broke five or ſix of the Covenants contained in the ſaid Leaſe; to which the Appellant having pleaded Performance of Covenants, the Reſpondents did not think proper to proceed any further in their Action, but filed a Bill in the Court of Chancery againſt the Appellant, for an Injunction to ſtay his Proceeding on the Judgments he had recovered againſt them, and obtained the common Injunction, which, upon the Appellant's putting in his Anſwer, was diſſolved, and the Reſpondents Bill was afterwards diſmiſſed, with Coſts, for Want of Proſecution.

Action brought by Reſpondents againſt Appellant, not proceeded on.

Bill in Chancery by Reſpondents for Injunction.

Diſmiſſed with Coſts, for Want of Proſecution.

On the 5th of *November* 1767, the Reſpondents filed a ſecond Bill in the Court of Chancery againſt the Appellant, complaining of the ſaid ſeveral Judgments and Verdicts obtained by the Appellant, and particularly with reſpect to the ſaid increaſed Rent of 5*l.* an Acre, for the ſaid Whinns and Furze ploughed up and converted into Tillage; and alledging that the ſaid Ten Acres, before they were ſo ploughed up, were of very little Value, and that the ſame were of greater

5th of Nov. 1767, 2d Bill filed.

greater Value in a State of Tillage; but that in regard the ploughing up the ſame might ſubject them to ſome Forfeiture, or Penalty, under the ſaid Leaſe, they or one of them acquainted the Appellant, his Steward, or Agent, with their Intention to ſtub up and plough the ſaid Ten Acres; and that the Appellant, or his Agent, had given Licence or Conſent to the ploughing up the ſame, or had afterwards acquieſced therein, and that the Appellant, after he had had Notice thereof, had received the original Rent, and ſettled Accounts with the Reſpondents; and likewiſe alledging, that the Subject-Matters of the Action were taken into Conſideration by the Arbitrators, and the Damages for Breach of the Covenants were included in the Award, or, if not, that ſome of the Breaches having happened before the Award, the Appellant was concluded by the Award not to ſeek any Satisfaction for them; and therefore praying, That, upon Payment by the Reſpondents to the Appellant of the Sum of 273*l.* 3*s.* 9*d.* as the neat Rent due from the Reſpondents under the ſaid Leaſe, from the 5th Day of *April* 1766, after deducting the Sum of 26*l.* 16*s.* 3*d.* for Land-Tax which they had paid; as alſo upon Payment by the Reſpondents of the Coſts and Expences the Appellant had been put to, for or by Reaſon of the commencing and proſecuting any Suit or Action at Law, againſt the Reſpondents, to compel the Payment of the ſaid Rent, together with a reaſonable Satisfaction for any Damage the Reſpondents ſhould appear to have done or committed, to or upon the ſaid Farm, or Premiſes thereunto belonging, without the

Conſent

Conſent of the Appellant, which the Reſpondents (if any) were ready and willing to pay; the Appellant might be reſtrained by Injunction from taking out Execution upon the ſaid Judgments obtained by the Appellant; and that the Award ſo made by the ſaid *Henry Partridge* and *Charles Turner* might be duly obſerved and performed by all Parties; and that the Appellant and Reſpondents might in Purſuance, and after Performance thereof, execute Releaſes to each other of all Matters in Difference between them, up to the Time of making the ſaid Award; and for general Relief.

Anſwer. To which Bill the Appellant put in his Anſwer, and thereby denied his having given any Licence or Conſent for the ploughing up the ſaid Ten Acres, or that he had any Notice before the Month of *April* 1766, that the ſame had been ploughed; and ſet forth the Submiſſion and Award, from whence it was evident that the Arbitration related only to the ſpecial Matters mentioned therein, and did not extend to the Breaches of Covenant for which the Appellant's Action was brought.

Proofs. The Reſpondents replied to the Anſwer, and Iſſue being joined thereon, ſeveral Witneſſes were examined; and it was proved, on the Part of the Appellant, that the Farm was greatly injured by the Miſmanagement of the Reſpondents, and was of leſs Value to be let at the End of the Year 1766, than when the Reſpondents took the ſame; and that ſince the Reſpondents had ploughed up the ſaid Ten Acres, they had never clayed, or manured the ſame, nor had given the ſame one ſingle Fallow; but

the

Reſpondents did not prove the Allegations in their Bill.

the Reſpondents did not prove any Licence or Conſent from the Appellant, or his Steward, for ploughing up the ſaid Ten Acres, or that the Appellant had any Notice thereof before the Time of making the ſaid Award, or before the 5th of *April* 1766, or that the Reſpondents had performed the Award on their Parts; which Matters the Reſpondents had alledged in their Bill as the Grounds of the Relief they prayed; *and the Contrary thereof was proved on the Part of the Appellant.*

20th Nov. 1769. Decree.

The ſaid Cauſe came on to be heard on the 20th of *November* 1769, before the then Lord High Chancellor of *Great Britain*, when the following Decree was made, *viz.*

" Whereupon, and upon debate of the Mat-
" ter, and hearing the Leaſe, dated the 23d of
" *September*, 1758, the Award, dated the 30th
" of *November*, 1765, ſigned *Henry Partridge*
" and *Charles Turner*; a Letter from the De-
" fendant to the Plaintiff *John Peterſon*, dated
" the 12th Day of *February*, 1766; another
" Letter from the Defendant to the Plaintiff
" *John Peterſon*, dated the 25th Day of *Febru-*
" *ary*, 1766; another Letter from the Defend-
" ant to the Plaintiff *John Peterſon*, dated the
" 28th Day of *March*, 1766; an Account ſet-
" tled, dated 5th of *April*, 1766; a Receipt,
" ſigned *Henry Barnes*, and the Proofs taken in
" this Cauſe read, and what was alledged by
" the Council on both Sides, His Lordſhip
" doth declare, That the Plaintiffs are entitled
" to be relieved againſt the Verdicts obtained
" by the Defendant againſt the Plaintiffs in the
" Pleadings mentioned, upon making the De-
" fendant

" fendant a juſt and adequate Satisfaction for
" the Damages he has ſuſtained, by Breach of
" all or any of the Covenants for which he has
" recovered Damages in the aforeſaid Verdicts:
" And therefore it is ordered, That the Parties
" do proceed to a Trial at Law, at the next
" Summer Aſſizes to be holden for the County
" of *Norfolk*, upon the following Iſſue, *Quan-*
" *tum Damnificatus*; in which Action, the
" Plaintiffs here are to admit the ſeveral Cove-
" nants have been broken in ſuch Manner as
" the ſame are averred to have been broken by
" the Declaration in the ſaid Action: And it is
" further ordered, that the Damages that ſhall
" be found by the Jury upon each of the ſaid
" Covenants, be ſeparately indorſed on the
" *Poſtea*; and that the Defendant here be Plain-
" tiff at Law, and that the Plaintiffs here be
" Defendants at Law, who are forthwith to
" name an Attorney, accept a Declaration, and
" appear and plead to iſſue: And it is further
" ordered, That Mr. *Pechell*, one of the Ma-
" ſters of this Court, do ſettle ſuch Iſſue, in
" Caſe the Parties differ; and that all Books,
" Papers, and Writings, in the Cuſtody or
" Power of any of the parties relating to the
" Matters in Queſtion, be produced before the
" ſaid Maſter, upon Oath, on or before the 1ſt
" Day of *Eaſter* Term next, and either Side is
" to be at Liberty to inſpect the ſame, and take
" Copies thereof, or of ſuch Part thereof as
" they ſhall be adviſed, at their own Expence:
" And it is further ordered, That ſuch of them
" as either Side ſhall give Notice to have pro-
" duced at the Tryal of the ſaid Iſſue, be pro-

" duced

" duced accordingly. And his Lordſhip doth " reſerve the Conſideration of the Coſts of this " Suit, and of all further Directions, until after " ſuch Tryal; and any of the Parties are to be " at Liberty to apply to the Court as there " ſhall be Occaſion."

The Appellant thinking himſelf aggrieved by the ſaid Decretal Order, has appealed therefrom to your Lordſhips, and humbly hopes it ſhall be Reverſed; and that he ſhall be permitted to take out Execution upon his Judgments obtained at Law; and that the Reſpondents Bill ſhall be diſmiſſed, with Coſts, for the following (among other)

REASONS:

1. The Queſtion, made by the Appellant, ariſes upon the Declaration in the Decree, and is a general and important Queſtion, viz. Whether, upon an Action of Covenant brought by a Landlord upon a Leaſe, and Damages therein aſſeſſed by a Jury, a Court of Equity has Juriſdiction, or ought to direct Iſſues for re-aſſeſſing the Damages.

There can be little Doubt upon this Queſtion; becauſe in all Actions which ſound in Damages, the Court and Jury have a compleat Juriſdiction to aſſeſs the Damages. The Verdict either can, or cannot, be ſet aſide for exceſſive Damages. If it can, the proper Application is to the Court in which the Action is brought: If that Court cannot ſet

ſet aſide the Verdict, the Aſſeſſment of Damages muſt be final; becauſe the Queſtion, as to the Quantum of the Damages, is not a Subject matter of an equitable Juriſdiction. Upon that Queſtion merely ariſing upon an Action at Law, without any Proof of Fraud, Miſtake, or an Agreement to wave the Verdict, a Court of Equity cannot direct a new Trial.

The preſent Caſe is an Exception out of the Rule, becauſe there is a Circumſtance in the Covenant, which will prevent the Courſe of Law from ſetting aſide the Verdict for Exceſſive Damages; for that the Damages in this Caſe were increaſed to 300*l.* by Means of the Covenant to pay 5*l.* an Acre increaſed Rent, for ploughing up the Ten Acres called the Whinns; That ſuch increaſed Rent is to be conſidered as a Penalty; That a Court of Law is bound by this Penal Covenant, but a Court of Equity can relieve againſt it. OBJECTION.

The 5*l. per* Acre increaſed Rent, is not a Penalty, but a liquidated Satisfaction, fixed and agreed upon by the Parties, and is reſerved as an additional Rent. The Tenant was under no accidental Neceſſity of ploughing the Land, which could excuſe him in Equity for ſo doing; nor had he any expreſs, or implied, Permiſſion to do it: He did it voluntarily, knowing he had a right to do it, upon Payment of a ſtipulated Sum, which he covenanted to pay. Whereas a Penalty is a Forfeiture for the better enforcing a Prohibition, or a Security for the doing a collateral Act; but no Prohibition is contained in the Covenant ANSWER I.

Covenant in Queſtion, to reſtrain the Tenant from ploughing; the Agreement being, that for Land not in Tillage ploughed up, a Rent ſhould be paid of 5*l.* an Acre.

II. The Decree is general, and ſets aſide the Verdicts intirely, and is not confined to the Breach of the Covenant for Payment of the additional Rent.

III. This being a Caſe between Landlord and Tenant, is of general Extent and Influence; and if, after the moſt ſolemn Stipulations between the Parties, the Tenant ſhall be declared to have a Right to reſtrain the Landlord from having the Fruit of his Agreement, and his Eſtates preſerved in the Condition he has ſtipulated for, without one Circumſtance in the Caſe to excuſe the Tenant for his wilful Violation of the Contract, it may be converted into an Example greatly detrimental to the Landed Property of this Kingdom, and miſchievous to the Tenants themſelves.

AL. WEDDERBURN.

JOHN MADOCKS.

JOHN HETT.

THE CASE OF

EDMUND ROLFE, Eſq; Appellant,

JOHN PETERSON, ſen. AND JOHN PETERSON, jun. } Reſpondents.

The Reſpondents Caſe.

BY indenture of leaſe of this date, made between the appellant of the one part, and the reſpondents of the other part, the appellant demiſed to the reſpondents all that farm ſituate in Eaſon, in the county of Norfolk, called Eaſon-Hall-Farm, conſiſting of a capital meſſuage or manſion-houſe, barns, ſtables, dairy, carthouſe, out-houſes, dovehouſes, yards, garden, orchard, with the cottages, and 400 acres of land, with the fold-courſe or ſheep-walk, for the ſmall trip or ſheep, then lett to John Rackham, the then tenant of the ſaid farm, to hold, from the 10th day of October then next, for the term of 14 years, at the yearly rent of 200l. payable half-yearly; in which indenture are (among others)

1758 September 23, Leaſe from the appellant to the reſpondent.

Habend. for 14 years from 10th Oct. rent 200l. per ann.

A the

the following covenants on the part of the reſpondents.

Special covenants in the leaſe on which the queſtion aroſe.

" That in caſe any part or parcel of the ancient meadow or paſture grounds, or any part " of the leaſed premiſes that had not been in " tillage within twenty years laſt paſt, ſhould, " during the continuance of the ſaid term, be " digged up, plowed, or converted into tillage; " or if any part or parcel of the arable lands " thereby leaſed ſhould, in or during the ſaid " term, be plowed up, or ſowed out of courſe, " contrary to the true intent and meaning of " the ſaid indenture, or the covenants therein " contained, then and in ſuch caſe or caſes the " reſpondents, or one of them, their executors " and adminiſtrators, ſhould and would, during " the then remainder of the ſaid term, pay or " cauſe to be paid unto the appellant, his heirs " or aſſigns, the further yearly rent or ſum of " five pounds for every acre ſo to be broke up " or converted into tillage as aforeſaid, or ſown " out of courſe, and ſo proportionably for eve- " ry greater or leſſer quantity than an acre, or " longer or ſhorter time than a year, over and " above the ſaid yearly rent, and upon the days " of payment thereof by equal portions.

" That the reſpondents, their executors, &c. " ſhould not, during the ſaid term of 14 years, " hew, fell, cut down, ſtub up, lop, top, take " or carry away, or cauſe or procure to be " hewed, felled, cut down, ſtubbed up, lopped, " topped, and taken or carried away any of the " timber trees, timber ſtands, willows, ſallows, " pollards, hazles, thorns, hedge-rows, quickſets, " buſhes, ſprings, or hedges ſtanding, grow- " ing, or being, or which at any time or times during

" during the ſaid term ſhall ſtand, grow, or be
" in, upon, or about the ſaid leaſehold pre-
" miſes (except ſuch thorns, buſhes, and bram- Exception.
" bles as ſhall be wanted to repair the gaps in
" the fences, to be cut and taken in ſuch places
" on the premiſes where the ſame can be beſt
" ſpared, and where the leaſt damage ſhall be
" done to the ſame thereby, and to be uſed for
" that purpoſe by the reſpondents, their execu-
" tors, &c. in a careful and huſbandlike man-
" ner; and alſo except ſuch thorns, buſhes,
" brambles, and ſtakes as ſhall be wanted to
" repair the reſt of the fences to be ſet out by
" the appellant, his heirs and aſſigns, as there-
" in after mentioned; and in default of ſuch
" ſetting out, then where the ſame could be
" beſt ſpared and be of leaſt damage to the
" premiſes; and alſo except the topwood of
" pollards, underwoods, and thorns where the
" ditching, cutting, and ſcouring therein after
" mentioned ſhall be done, which, after mak-
" ing a good hedge there, and applying the
" overplus thorns towards repairing the reſt of
" the fences, the reſpondents, their executors,
" &c. were to have and take to their own pro-
" per uſe as after mentioned) under the penal-
" ty of forfeiting and paying to the ſaid ap-
" pellant, his heirs and aſſigns, the ſum of five
" pounds per load for every load that ſhould
" be ſo hewed, felled, cut down, ſtubbed up,
" lopped or topped, taken or carried away as
" aforeſaid, and ſo proportionably for any
" greater quantity than a load; and alſo that
" the reſpondents, their executors, &c. ſhould
" from time to time, during the ſaid term, do
" their beſt endeavours to preſerve the young
" trees, layer and quicks of all kinds, then
" ſtanding, growing, or being, or to ſtand,

" grow, or be in, upon, or about the ſaid de-
" miſed premiſes, or any part thereof; and in
" caſe any perſon or perſons ſhould deſtroy,
" ſpoil, or damage the ſame during the ſaid
" term, that then the reſpondents, their exe-
" cutors, &c. ſhould and would forthwith from
" time to time give notice thereof to the ſaid
" appellant, his heirs, &c. and by whom to
" the beſt of their knowledge the ſame was
" done, or how the ſame happened, that ſuch
" perſon or perſons committing the ſame might
" be proſecuted as the law directs; and alſo
" that the reſpondents, their executors, &c. at
" their or one of their proper coſts or charges
" ſhould and would from time to time, during
" the ſaid term of 14 years, keep and main-
" tain, and at the end or other ſooner determi-
" nation thereof leave and yield up to the ap-
" pellant, his heirs and aſſigns, the gardens be-
" longing to the ſaid premiſes (except ſuch
" part thereof as was agreed to be converted
" into an orchard) and alſo the court-yard and
" orchard, and the part of the garden to be
" converted into an orchard, in a handſome,
" good, and proper manner, as gardens, court-
" yards, and orchards reſpectively, and alſo
" keep and preſerve all the fruit-trees and o-
" ther trees there growing and being, or to
" grow and be there, during the ſaid term, by
" pruning and managing the ſame and the
" fences thereof in a careful and proper man-
" ner, the ſame being to be put into a like ſtate
" by the ſaid appellant, his heirs, &c. at the
" commencement of the ſaid leaſe; and alſo
" that the reſpondents, their executors, &c.
" ſhould not nor would at any time or times
" during the ſaid term ſow or cauſe to be ſown
" any part of the ſaid arable lands of the

" thereby

"thereby leaſed premiſes with winter corn,
"without firſt ſummer-tilling, mucking, and
"tathing the ſame in an huſbandlike manner,
"except in a dry ſeaſon, when the ollands
"would not be broke up at or about Midſum-
"mer time, in which caſe the ſame might be
"ſowed with winter corn upon the flagg."

In purſuance of this leaſe the reſpondents entered into the poſſeſſion of the farm, and duly paid the reſerved rent up to Lady-day 1765.

1759 Reſpondents converted ten acres of waſte into tillage.

In the year 1759, the reſpondents apprehending it would be advantageous both to the farm and themſelves to convert into tillage a certain parcel of waſte ground, containing about ten acres, lying open to Eaſon Heath, which was then overgrown with whinns or furze, low in growth, and thinly ſcattered, and of no ſervice whatever as a ſhelter for ſheep or cattle, or otherwiſe, and not worth one ſhilling per acre in its then ſtate and condition, there being no timber or underwood thereon; and from a perſuaſion that it would be deemed a benefit to the inheritance, and that the covenants in the leaſe could not be conſtrued to extend to any whinn, or other ground, except ancient meadow or paſture ground, or land of the like nature and value; the reſpondent, in June 1759, accordingly ſtubbed up the furze or whinns growing upon the ſaid ten acres of land, and, after being at great expence in clearing and preparing the ſame for the plough, continued it in tillage for ſeveral years, without any complaint being made, or fault found, by the appellant, or his ſtewards or agents, relating thereto; although the appellant had his reſidence in the

the neighbourhood, and his ſtewards or agents had very frequent opportunities of obſerving the waſte lands ſo converted into tillage, and, by their not objecting thereto, they gave an implied conſent.

Difference between appellant and reſpondents

Previous to June 1765 ſeveral differences had ariſen between the appellant and reſpondents concerning the ſaid farm, and the covenants and agreements contained in the ſaid leaſe; it was therefore agreed to refer all ſuch diſputes and differences as then ſubſiſted between them, to the arbitration of two indifferent perſons, namely, Henry Partridge and Charles Turner, both of King's Lynn, Eſquires, and the appellant and reſpondents executed mutual bonds of arbitration, dated the twenty-ſecond of June 1765, whereby they bound themſelves to abide by ſuch award as the ſaid arbitrators ſhould make, concerning all manner of actions, and cauſes of actions, then depending between the appellant and reſpondents, ſo as ſuch award was made on or before the firſt day of December then next.

1765 June 22d, Bonds of arbitration.

Soon after ſuch bonds were ſo entered into, the ſaid arbitrators were attended by the appellant and reſpondents, or their reſpective agents, who produced before them their reciprocal claims and demands, and laid before the arbitrators ſuch evidence as they had in ſupport thereof; and, in particular, the agents of the appellant went over and viewed the farm, to obſerve the ſtate and condition thereof; and the arbitrators, having heard and fully conſidered all the matters in difference between the parties, made their award in writing, dated the 30th of November 1765, whereby they award-

1765 Nov. 30th Award.

ed

ed (among other things to be done by the appellant and reſpondents) that on payment by the appellant and reſpondents to Clement Ives, therein named, of the money thereby directed to be by him laid out in ſuch repairs as therein is mentioned, the appellant and reſpondents ſhould execute to each other general releaſes to the day of the date of the ſaid award.

The reſpondents punctually performed their part of the ſaid award, except as to the execution of the general releaſe to the ſaid appellant, which they repeatedly offered to execute, and requeſted the appellant to execute ſuch general releaſe to them as by the ſaid award was directed, which he abſolutely refuſed to do.

The appellant, or the ſtewards or agents employed by him, and intruſted to inſpect the ſaid farm on that occaſion, were, at the time of entering into the above bonds of arbitration, and previous to the award, fully acquainted that the reſpondents had ſtubbed and plowed up the ſaid ten acres of land ſo covered with furze as aforeſaid; yet, from a conſciouſneſs that the doing ſo was beneficial to the farm, they never thought proper, either before or at the time of making the award, to make any claim upon the reſpondents on that account, which is, as the reſpondents contend, a clear evidence that the appellant, or his ſtewards or agents ſo employed and entruſted, did not at that time conſider the reſpondents conduct, in that particular, to be either contrary to the true intent and meaning of the ſaid indenture or leaſe, or the covenants therein contained, or in any wiſe injurious to the demiſed premiſes.

In

In the beginning of 1766, the reſpondent John Peterſon the Elder was deſirous of quitting the farm, and of giving up the leaſe thereof, and communicated ſuch his deſire to the appellant, or to Mr. Ives, his ſteward, in writing, and the appellant wrote the ſaid reſpondent an anſwer thereto, as follows:

"Brook-Hall, Feb. 12, 1766. Mr. Peter-
"ſon, I received yours to Mr. Ives, and ſhould
"have anſwered it ſooner, but have been ſo
"exceedingly out of order and ill. I will ap-
"point a meeting as ſoon as poſſible, as you
"deſire; and ſhould be as glad to have every
"difference adjuſted and ſet right, as you can
"poſſibly have. I ſhall have no objection to
"your leaving my farm at Michaelmas next,
"on juſt and equitable terms; and hope, when
"we meet, ſome method may then be thought
"of to ſettle the affair."

The reſpondent, John Peterſon the Elder, continued to preſs the appellant to permit him to give up the leaſe, and to ſettle all differences between them; whereupon the appellant wrote another letter to the ſaid reſpondent, as follows, viz.

"Brook, February 25th, 1766. Mr. Pe-
"terſon, I have been confined to my houſe now
"almoſt a month, with a violent cold, and
"rheumatic diſorder, but am now, I hope,
"ſomething better; and as you deſired in your
"laſt to Mr. Ives, I will meet you at Nor-
"wich, on Monday the ninth of March next,
"to ſettle all differences, if you approve of it,
"and at the ſame time to ſettle your leaving
"the farm at Michaelmas next."

The

The reſpondent, John Peterſon the Elder, being much indiſpoſed at the time of the propoſed meeting at Norwich, he acquainted the appellant therewith, and deſired him to appoint another day; in conſequence whereof the reſpondent received a third letter from the appellant, promiſing to meet the reſpondent at Norwich on the fifth of April 1766; and deſired the ſaid reſpondent to bring with him all his receipts for monies paid, and then every thing would be very ſoon and eaſily ſettled.

1766 Accounts ſettled by reſpondents and Mr. Berry, appellant's attorney.

On the fifth of April 1766, and in compliance with ſuch propoſal, the reſpondent went to Norwich in order to ſettle all matters in difference with the appellant, who, not thinking fit to attend there himſelf, employed, entruſted, and fully authorized Mr. Jere. Berry, his attorney, to ſettle the account then remaining unadjuſted between the appellant and the reſpondents; and accordingly the ſaid Jere. Berry (on the behalf of the appellant) drew out an account between him and the reſpondents, by way of debtor and creditor, on the balance whereof it appeared, that there was a ſum of 22l. 15s. due to the appellant; which the reſpondents paid, and, at the foot of the account, Mr. Berry wrote and ſigned the following diſcharge: —— "5th April 1766, Then "ſettled the above account with Meſſrs. John "Peterſons on behalf of Edmund Rolfe, Eſq; "and received of them the above balance, "JERE. BERRY."

Balance paid and receipt given.

The appellant not attending in perſon at the ſettling of the above account, the reſpondents were not able to ſettle the terms of quitting the farm, which was the only matter then re-

maining unſettled; but the reſpondents had afterwards ſeveral meetings with the appellant and his agents for that purpoſe, but at ſuch meetings they ſtarted freſh difficulties and objections, and began to introduce claims upon the reſpondents reſpecting the above ten acres of waſte which had been converted into tillage; and inſiſted on taking advantage of the ſuppoſed breach of covenants in the leaſe. As this demand was not only unconſcionable in itſelf (no detriment whatever accruing thereby to the appellant) but as the ſame had never been ſet up during the courſe of ſeven years, nor was mentioned at the time of the arbitration, or when Mr. Berry ſettled the above account, the reſpondents refuſed to pay the penalties which the appellant inſiſted upon, under pretext of breach of covenants in the leaſe; whereupon in Trinity Term 1766, the appellant brought an action againſt the reſpondents in the Common Pleas, and declared therein, and aſſigned five ſeveral breaches of the covenants contained in the ſaid leaſe, and, particularly, for ploughing, breaking up, and converting into tillage, on the 5th of April 1762, the ſaid ten acres of land, called whinns or furze cover, which had not been in tillage for twenty years next before the date of the ſaid indenture of leaſe, contrary to the form and effect of his covenant therein contained; for which he averred 200l. to be due on the 5th of April 1766, for four years, at the rate of five pounds an acre in each year, for that *once* ploughing; and alſo other 200l. on another breach, for one and the ſame tranſaction, for ſtubbing up, taking, and carrying away forty loads of whinn buſhes, at five pounds per load; and aſſigned three other breaches for damages, otherwiſe ſuppoſed

Trinity Term 1766, Action brought by appellant for breach of covenants.

ſuppoſed to be done to the ſaid farm by the reſpondents miſmanagement thereof.

The reſpondents were at that time adviſed they could not, and therefore did not, make any defence to the ſaid action, and the appellant executed a writ of inquiry, and upon that inqueſt, chiefly on the evidence of one John Rackham, the former tenant of the farm, who had himſelf, during his occupation of the ſaid ten acres, ſtubbed up and ſold the whinns growing thereon, the appellant obtained judgment for 300l. two hundred pounds of which was for converting the above piece of waſte ground into tillage; ſeventy-five pounds for carrying away fifteen loads of the whinns growing thereon, at five pounds a load; and twenty-five pounds for other damages ſuppoſed to be done to the farm. Not contented with the damages ſo given on the execution of the ſaid writ of inquiry, the appellant brought two other actions, in the court of Common Pleas, for the original reſerved rent of 200l. per annum, due at Lady-day and Michaelmas 1767, (though the reſpondents were, on each of thoſe days reſpectively, ready, as they had always been, to pay ſuch rent as it became due) and alſo for the further penalty of five pounds an acre, for that year, *for the ſame ploughing the ten acres*, and obtaining judgments by default in both the actions.

Reſpondents make no defence.

Judgment for 300l.

Two other actions for rent.

Notwithſtanding the above judgments, it is a certain fact, that ſince the reſpondents have had poſſeſſion of the farm it has been well managed and conducted, and the covenants contained in the leaſe, on the reſpondents part, have been duly performed, accord-

Farm improved by reſpondents.

ing to their true intent and meaning, with reſpect to every part of the eſtate; and it is well known that the farm is now worth at leaſt twenty pounds per annum more than when the reſpondents entered upon it. With reſpect to the ten acres of waſte lands, the ſame were ſtubbed up, and converted into tillage at a time when they were not worth more than one ſhilling per acre per annum; but are now, by proper cultivation, worth at leaſt ſix ſhillings per acre per annum; and would have been worth much more, if the reſpondents had been permitted to purſue their own method of cultivation till the end of their term. And the ſum claimed by the appellant under the judgments already obtained, or which the appellant may obtain, if permitted to ſue for ſuch penalties at law till the expiration of the term, *would amount to more than thirty times the value of the very inheritance itſelf of the ſaid ten acres*; and yet the ſaid ten acres, at the expiration of the leaſe, will be in better condition, even as a whinn cover for game, or otherwiſe, than ever they were before; the ſtubbing up being the cauſe of the whinns, before low, thin, and ſcattered, growing higher and much thicker when the cultivation was diſcontinued.

Reſpondents offered to pay the appellant his coſts, expences, and damages.

After the above judgments were obtained, the reſpondents applied to the appellant, and offered to repay him all coſts and expences which he had been put to on account of the ſeveral actions at law; and to make him a reaſonable ſatisfaction for any damage that might, in the judgment of two indifferent perſons, have been done to the farm by the ploughing and ſtubbing up the ten acres of furze, or otherwiſe; provided the appellant would execute

cute ſuch general releaſe to the reſpondents, as directed by the award; but he declining ſo to do, and threatening to take out execution on the ſeveral judgments then obtained, and to ſue for the other penalties, during the remainder of the term, for *once* ploughing the ſaid ten acres: ——— The reſpondents, therefore, on the

Filed their bill, in the High Court of Chancery, againſt the ſaid appellant, thereby praying, That upon payment by the reſpondents to the appellant of 273l. 3s. 9d. being the nett rent due from them to him, under the ſaid leaſe, from the fifth of April 1766 (up to which time the ſaid rent was paid) after deducting 26l. 16s. 3d. for land-tax, which the reſpondents had already paid; and alſo upon payment by the reſpondents of the coſts of the appellant at law, together with a reaſonable ſatisfaction for any damage which the reſpondents ſhould appear to have done upon the ſaid farm without the leave of the appellant (which the reſpondents thereby offered to pay); the appellant might be reſtrained, by injunction, from taking out execution upon the ſaid judgments obtained by him as aforeſaid; and that the ſaid award might be performed, and that all parties might, in purſuance thereof, execute general releaſes to each other of all matters in difference between them, up to the time of making the ſaid award. 5th Nov. 1767, Bill brought by reſpondents.

To this bill the appellant put in his anſwer; and moved the court to diſſolve the injunction which had been obtained by the reſpondents, by the courſe of the court; and, upon ſhewing cauſe why the ſaid injunction ſhould not be 1768 Feb. 17th, Appellant's anſwer.

be diſſolved, the late Lord Chancellor was pleaſed to order the injunction to be continued, till the hearing of the cauſe, on the terms of the reſpondents paying to the appellant all the unincreaſed rent in arrear, and all the appellant's coſts at law; in compliance with which order the reſpondents paid to the appellant, or his agent, the ſum of 548l. 3s. 7d. including the land-tax, and 92l. 13s. 9d. which was received out of court by the appellant; and afterwards, the reſpondents having replied to the ſaid anſwer, diverſe witneſſes were examined on both ſides, and publication having paſſed, the ſaid cauſe came on to be heard before the late Lord Chancellor, on the 20th day of November 1769, when his Lordſhip was pleaſed to declare, That the reſpondents were intitled to be relieved againſt the verdicts obtained by the appellant againſt the reſpondents, upon making the appellant a juſt and adequate ſatisfaction for the damage he had ſuſtained by breach of all or any of the covenants, for which he had recovered damages in the ſaid verdicts; and therefore his Lordſhip ordered, that the parties ſhould proceed to a trial at law, at the then next ſummer aſſizes to be holden for the county of Norfolk, upon the following iſſue: —— *Quantum damnificatus:* in which action the reſpondents were to admit the ſeveral covenants had been broken, in ſuch manner as the ſame were averred to have been broken by the declarations of the ſaid actions.

1769, Nov. 20th Decree by Lord Camden,

And it was further ordered, That the damages that ſhould be found by the jury, upon each of the ſaid covenants, ſhould be ſeparately indorſed on the *poſtea*; and that the appellant ſhould be plaintiff at law, and the reſpondents

dents defendants at law, who were forthwith to name an attorney, accept a declaration, and appear and plead to iſſue. And it was farther ordered, that Maſter Peachell ſhould ſettle ſuch iſſue, in caſe the parties differed; and that all books, papers, and writings in the cuſtody or power of any of the parties, relating to the matters in queſtion, ſhould be produced before the ſaid maſter, upon oath, on or before the firſt day of Eaſter Term then next; and either ſide was to be at liberty to inſpect the ſame, and take copies thereof, or of ſuch parts thereof as they ſhould be adviſed, at their own expence. And it was ordered, That ſuch of them as either ſide ſhould give notice to have produced at the trial of the ſaid iſſue, ſhould be produced accordingly. And his Lordſhip reſerved the conſideration of coſts, and of all further directions, until after ſuch trial; and any of the parties were to be at liberty to apply to the court, as there ſhould be occaſion.

The ſaid Edmund Rolfe neither proceeded to the trial of ſuch iſſue, at the time limited for that purpoſe by the court, nor took any previous ſtep thereto, although the reſpondents always were, and ſtill are, ready to perform what is directed by the ſaid decretal order to be done, on their part; nor appealed to your Lordſhips from the ſaid decretal order, during the laſt ſeſſion of parliament, as he ought to have done, if he did not acquieſe in the ſame.

But now from this decretal order the ſaid Edmund Rolfe has appealed to your Lordſhips; but the reſpondents humbly hope the ſame ſhall not be reverſed, but ſhall be affirmed by your Lordſhips for the following, among other

REASONS:

be diſſolved, the late Lord Chancellor was pleaſed to order the injunction to be continued, till the hearing of the cauſe, on the terms of the reſpondents paying to the appellant all the unincreaſed rent in arrear, and all the appellant's coſts at law; in compliance with which order the reſpondents paid to the appellant, or his agent, the ſum of 548l. 3s. 7d. including the land-tax, and 92l. 13s. 9d. which was received out of court by the appellant; and afterwards, the reſpondents having replied to the ſaid anſwer, diverſe witneſſes were examined on both ſides, and publication having paſſed, the ſaid cauſe came on to be heard before the late Lord Chancellor, on the 20th day of November 1769, when his Lordſhip was pleaſed to declare, That the reſpondents were intitled to be relieved againſt the verdicts obtained by the appellant againſt the reſpondents, upon making the appellant a juſt and adequate ſatisfaction for the damage he had ſuſtained by breach of all or any of the covenants, for which he had recovered damages in the ſaid verdicts; and therefore his Lordſhip ordered, that the parties ſhould proceed to a trial at law, at the then next ſummer aſſizes to be holden for the county of Norfolk, upon the following iſſue: —— *Quantum damnificatus:* in which action the reſpondents were to admit the ſeveral covenants had been broken, in ſuch manner as the ſame were averred to have been broken by the declarations of the ſaid actions.

1769, Nov. 20th Decree by Lord Camden.

And it was further ordered, That the damages that ſhould be found by the jury, upon each of the ſaid covenants, ſhould be ſeparately indorſed on the *poſtea*; and that the appellant ſhould be plaintiff at law, and the reſpondents

dents defendants at law, who were forthwith to name an attorney, accept a declaration, and appear and plead to iſſue. And it was farther ordered, that Maſter Peachell ſhould ſettle ſuch iſſue, in caſe the parties differed; and that all books, papers, and writings in the cuſtody or power of any of the parties, relating to the matters in queſtion, ſhould be produced before the ſaid maſter, upon oath, on or before the firſt day of Eaſter Term then next; and either ſide was to be at liberty to inſpect the ſame, and take copies thereof, or of ſuch parts thereof as they ſhould be adviſed, at their own expence. And it was ordered, That ſuch of them as either ſide ſhould give notice to have produced at the trial of the ſaid iſſue, ſhould be produced accordingly. And his Lordſhip reſerved the conſideration of coſts, and of all further directions, until after ſuch trial; and any of the parties were to be at liberty to apply to the court, as there ſhould be occaſion.

The ſaid Edmund Rolfe neither proceeded to the trial of ſuch iſſue, at the time limited for that purpoſe by the court, nor took any previous ſtep thereto, although the reſpondents always were, and ſtill are, ready to perform what is directed by the ſaid decretal order to be done, on their part; nor appealed to your Lordſhips from the ſaid decretal order, during the laſt ſeſſion of parliament, as he ought to have done, if he did not acquieſe in the ſame.

But now from this decretal order the ſaid Edmund Rolfe has appealed to your Lordſhips; but the reſpondents humbly hope the ſame ſhall not be reverſed, but ſhall be affirmed by your Lordſhips for the following, among other

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I. The exceſs of penalties is a proper conſideration of courts of equity, which, for ages paſt, have conſtantly and uniformly exerciſed their juriſdiction on this head, and ground of relief; and are never employed with ſuch particular propriety, nor ſo conſiſtently with the chief end of their inſtitution, in this kingdom, as when they are uſed as a temperament to mitigate the rigour of the common law. And landlords and tenants have ever been the peculiar objects of equity, which has continually interpoſed in unconſcionable bargains between parties bearing *that* relation to each other; *formerly*, by vacating ſuch leaſes; but, in more *modern* practice, by giving relief againſt the the penalties, where the matter lies in damages, on payment of an adequate compenſation to the real injury ſuſtained.

II. Theſe rigorous covenants, though ſeemingly made for the preſervation of eſtates, are, in effect, a new mode of raiſing rents, more oppreſſive than the proceeding by ejectment; and are not in the nature of a contract, but of a penalty, or vindictive damages, therefore ought to receive no countenance in equity, as the penalty thereby reſerved, in the name of rent, frequently exceeds the value of the inheritance; and, in this caſe in particular, the penalty of five pounds an acre, ſo reſerved during the remainder of the term, for *once* ploughing, *amounts to more than thirty times the value of the inheritance of the ten acres, before they were put into a ſtate of cultivation by the reſpondents.* And as all amerciaments for puniſhments,

ments, at law, ought to be *ſalvo contenemento*; ſo courts of equity ought to extend the principle, by giving relief againſt all reſervations, *nomine pœnæ*, where they are apparently exceſſive, in proportion to the injury committed, if any; and, if none, *damnum ſine injuria*, is, it is apprehended, not conſidered by the law of England.

III. Any eſtimation of damages between the parties preſuppoſes an injury committed; and the converting the ten acres into tillage was no injury, but an improvement to the eſtate; but even ſuppoſing an injury had really been ſuſtained, yet the iſſue of *quantum damnificatus* was properly directed, and the quantity of ſuch damages ought not to be left to the unconſcientious eſtimation of the party, but the aſcertainment thereof is the immediate and peculiar province of a jury.

IV. The damages of 300l. given on the execution of the writ of inquiry, in the manner already mentioned in the caſe, are outrageous; and ſo proper to be moderated in a court of equity, which judges *ſecundum conſcientiam et arbitrium boni viri*, therefore the Chancery could not, conſiſtently with theſe principles, withhold its interpoſition, or refuſe the relief prayed by the reſpondents under ſuch peculiar circumſtances.

V. The determination, in the preſent caſe, cannot affect covenants in relation to ancient meadow or paſture (though even on ſuch covenants, the ſame principles would attach, if the penalties were apparently exceſſive) as the land ploughed here was not even of like nature or value; and the penalties inſiſted on by the appellant, for ploughing whinn-ground, inſtead of being beneficial to the eſtate, are a diſcouragement to agriculture in general; and

ſuch ploughing is not within the true intent and meaning, or equitable conſtruction of the leaſe, according to its genuine ſenſe, and the rule of ſound interpretation; and conſequently the decretal order, made at the hearing of this cauſe, is no controul or change of the true ſtipulation and engagement made and entered into between the parties themſelves.

For theſe and many other reaſons to be offered at your Lordſhips bar, the reſpondents hope that the decretal order, made on the hearing of this cauſe, ſhall in all things be affirmed.

J. DUNNING.
GEORGE BARNES.

The CASE as agreed by the Counſel on both ſides, was as follows.

IN 1758 John Peterſon, the reſpondent, hired a farm at Eaſton of the appellant Edmund Rolfe, Eſq; at 200l. per ann. on a leaſe for 14 years. The reſpondent covenanted with the appellant, that if he plowed up any part of the premiſes that had not been in tillage within twenty years, he was to pay 5l. per ann. encreaſe of rent, during the remainder of his leaſe, for every acre of land ſo plowed up: alſo, that if he cut, and carried away any thorns, buſhes, &c. from off the premiſes, that he was to pay to the appellant 5l. for every load ſo carried away.

In 1759 Peterſon, the reſpondent, ſtubbed up 10 acres of whinn cover, laying on Eaſton Heath, ſold the whinns, and converted the ſaid 10 acres into tillage, in order, as he ſaid, to improve the land.

About the year 1765 ſeveral matters in diſpute aroſe between the landlord and tenant, which they agreed to refer to Mr. Partridge and Mr. Turner of Lynn, to ſettle. In

In 1766 the appellant had the first notice from his steward of the respondents having broke up the whinn cover; upon which he brought an action against him in Common Pleas. The respondent did not plead to the declaration, but suffered judgment to go against him by default. The appellant caused a writ of inquiry to be executed on the said judgment, when the jury gave him 300l. damages. The respondent apply'd to the court of Chancery for relief, alledging that the breach of covenant was included in the matter that had been referred to Mr. Partridge and Mr. Turner; or that he the respondent had obtained leave from the appellant, or his steward, to break up the cover previous to the doing it. The respondent however, was not able to make good either of these pleas; but Lord Camden was pleased to order the damages to be assessed by a jury, as he was of opinion, that the penalty was by no means proportionable to the injury.—Against this decree Mr. Rolfe appealed to the House of Lords. Mr. Wedderburn, counsel for the appellant, urged that this agreement was not in the nature of a common penalty; that it was to all intents and purposes to be considered as part of the reserved rent; that a court of equity never had a right to set aside an agreement, where it plainly appeared no fraud nor collusion had been used, or intended: he quoted many cases to support this argument, from Lord Nottingham's time down to Lord Hardwick's; amongst which was a case in point:—A gentleman let a farm, and the tenant covenanted, that if he broke up certain parcels of the premises he was to pay 20s. per acre for every acre broke up: the tenant plowed up the land to sow it with hemp: the landlord prayed the court of Chancery to grant an injunction, as the 20s. per acre was not equivalent for the damage the land would sustain by being sown with hemp: Lord Hardwick refused it, saying, that

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as the agreement had been deliberately entered into by both parties, he could not interfere; the buſineſs of a court of equity being to enforce the performance of contracts, rather than to ſet them aſide.

The Solicitor-General further informed their Lordſhips, that if the court of Chancery was allowed to ſet aſide agreements between landlord and tenant, it would be unneceſſary to make any leaſes, as the validity of the covenants contained in them muſt depend upon the ſenſe a jury may entertain of their propriety, which would be given up all power over their own property.

Mr. Dunning, counſel for the reſpondent, ſet forth, that the court of Chancery had for the wiſeſt and moſt ſalutary purpoſes been inveſted with a power of mitigating the ſeverity of the laws, in many caſes; that it was impoſſible in framing of laws to provide for all poſſible contingencies, by which individuals might be aggrieved, that it was the province of that court, whenever ſuch caſes happened, to interpoſe the power with which the conſtitution had armed it; that it was impoſſible it could be more properly exerciſed than upon this occaſion, becauſe it had been proved that the land broke up had been improved to ſix times its value, which was a benefit to the landlord, for doing of which the appellant inſiſted upon a ſum of money not leſs than thirty times the value of the land; that therefore the penalty was unconſcionably exceſſive, and that the court of Chancery had an indiſputable right to relieve againſt it. He argued that the caſes quoted by the counſel on the other ſide, were not in point, as they all, except one, ſuppoſed an injury, whereas in the preſent one, the appellant did not pretend he had received any; on the contrary, that it had been proved the land was of much greater value in tillage, than in the ſtate it was in when the the farm was hired.

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The Solicitor-General reply'd, that the land being benefited or not by the act, was not a matter for their Lordſhips to conſider; the queſtion was, Whether the tenant was obliged to fulfil his part of the agreement, or not? that the reſpondents plea in petitioning the court of Chancery was, that the breaking up the ten acres in queſtion, and ſelling the whinns, had been part of the diſpute which had been left to the reference of Mr. Partridge and Mr. Turner; or that previous to his breaking them up, he had obtained leave from the appellant or his ſteward, to do it; if either of theſe pleas could have been proved, then the Lord Chancellor would have done right to have granted an injunction; but the reſpondent could not make good either of the aſſertions upon which he had grounded his petition to the court of Chancery.

The Biſhop of Peterborough then got up, and ſaid, that no perſon had a greater veneration for the court where the decree had been made than himſelf, but ſtill he ſhould be ſorry to ſee it interfere in controuling the eſtabliſhed law, or in ſetting aſide agreements entered into between man and man.

The preſent Lord Chancellor then came forward, and ſaid, that the preſent queſtion was the moſt important that had of many years been brought before the houſe; that their Lordſhips were not to conſider it as a penalty for the breach of covenants, for that in fact no covenant had been broken, the reſpondent not having covenanted *that he would not break up ſuch part of the demiſed premiſes*, but *that if he did break them up, he was to pay* 5l. *per acre increaſe of rent*; that the reſpondent had a right to break them up, on paying the money he had agreed for to pay; that as there was an agreement made between man and man, he thought the court of Chancery could not interfere, or ſet it aſide; that the buſineſs of that court was rather to enforce the performance of

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covenants; that he remembered a determination of Lord Hardwick's in a ſimilar caſe:—A perſon had let a bowling-green to an innkeeper, who had covenanted that *he would not break it up*, and *that if he did he would pay* 5l. *per ann. increaſe of rent.* Under the bowling-green was a bed of gravel, which he had agreed to ſell for a conſiderable ſum of money, and was therefore reſolved to break it up, and pay the 5l. per ann. The landlord apply'd to the court of Chancery, praying that an injunction might be granted to prevent the tenant's breaking up the bowling-green. Lord Hardwick ſaid, that if the covenant had only been to pay 5l. per ann. in caſe the green had been broke up, he could not have interfered, it being a ſolemn contract between the parties; but as the tenant had alſo covenanted that he would not break it up, he would make him ſtrictly perform his agreement, and accordingly granted an injunction.

The queſtion then being put, the decree was reverſed. There were preſent upwards of eighty Peers, and in the judgment there was not one diſſenting voice.

FINIS.